IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2118 OF 2007

Jamil Ahmed Khan ..Petitioner

Vs.

Abdul Rahim Ghori ..Respondent

Mr. N.V. Walawalkar, Senior Counsel with Mr. G.S. Godbole i/by M/s. Soloman and Co. for petitioner.

Mr. Anil Singh with Mr. D.R. Shah for respondent.

CORAM: B.H. MARLAPALLE, J.

Date : April 26, 2007.

P.C.:

1. Heard Mr. Walawalkar with Mr. Godbole the learned counsel for the petitioner and Mr. Anil Singh the learned counsel for the respondent.

2. Rule. Respondent waives service. By consent of the parties, the petition is taken up for final hearing forthwith.

3. RAE Suit No. 153/288 of 1997 was filed by the respondent-landlord for eviction of the

petitioner-tenant before the Small Causes Court at Bombay on the ground that the suit premises i.e. Flat admeasuring about 650 sq.fts. was kept locked for few years and the tenant was absconding or he was under detention. The said suit came to be decreed ex parte on 6/8/2001. Misc. Notice No. 264 of 2002 was filed on or about 25/7/2002 on or about 25/7/2002 for setting aside an ex parte decree and restoration of R.A.E. Suit No. 153/288 of 1997 by the present petitioner-defendant. The landlord filed reply to the said notice on 19/10/2002 and also took out execution Notice No. 291 of 2002 praying for the decree of eviction to be executed. It is claimed that both these notices were being shown on the board of the Small Causes Court from time to time. However, at some point of time they were detached from each other. On 4/7/2003 both the notices were listed separately on the board of the Small Causes Court and Misc. Notice No.264 of 2002 was called out earlier when none remained present for the defendant-tenant and, therefore, the said notice was dismissed in default. On the very same day i.e. 4/7/2003 when subsequently Misc. Notice No. 291 of 2002 was called out, though

none was present for the plaintiff, the defendant was present in person, as has been noted by the Lower Appellate Court. However, on 1/3/2004 the petitioner applied for restoration of Misc. Notice No. 264 of 2002 by filing Misc. Notice No.85 of 2004 claiming that it was for the first time that on 26/2/2004 that the petitioner came to know through his lawyer that Misc. Notice No. 264 of 2002 was already dismissed in default. The learned Judge of the trial court by his order discharged the said Misc. Notice No. 85 of 2004 by his order dated 7/7/2004 and the said order was challenged in Revision Application No. 7 of 2007 which also came to be dismissed by the Division Bench of the Small Causes Court on 3/2/2007 and hence this petition.

4. Misc. Notice No. 264 of 2002 was admittedly dismissed on 4/7/2003 on the ground that none appeared for the applicant-defendant and it is also admitted that on the very same day when Misc. Notice No. 291 of 2002, as filed by the landlord, was called out, the defendant was present in person. Therefore, it cannot be said that the defendant was negligent in

prosecuting Misc. Notice No. 264 of 2002. It is a fact that though the said notice was dismissed in default on 4/7/2003 the petitioner-defendant did not take timely steps for submitting a restoration application and the same was, in fact, submitted for the first time on 1/3/2004 i.e. almost after seven months. The reason given by the petitioner is that for the first time he came to know through his lawyer on 26/2/2004 that Misc. Notice No. 264 of 2002 was dismissed in default. The reason may be correct also, but this delay itself cannot be a reason for refusing to restore the dismissed Misc. Notice No. 264 of 2002 on account of default on the part of the advocate. The said notice is required to be decided on merits and the petitioner cannot be unsuited in this manner. The Courts below could have imposed costs on the petitioner-defendant and he should not be allowed to suffer on account of the likely fault on the part of his learned Advocate.

5. Hence, this petition succeeds partly and the impugned order discharging Misc. Notice No. 85 of 2004 is hereby quashed and set aside. The said notice

is hereby allowed subject to payment of costs quantified at Rs.5000/- and this amount shall be deposited with the Registry of the trial court within a period of one week by the petitioner. The respondent-landlord is allowed to withdraw the said amount. Misc. Notice No. 264 of 2002 is hereby restored and the same will be heard and decided on its own merits. The stay granted by this court will continue to operate till Misc. Notice No. 264 of 2002 is decided. The said notice will be hear and decided as expeditiously as possible and preferably by 30/6/2007. The learned advocates for the respective parties have assured this court that the parties will cooperate with the trial court in disposing of the said notice within the specified period.

6. Rule is made absolute accordingly.

(B.H. Marlapalle,J.)